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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 JOEL ZELLMER,

10 Petitioner,

Case No. C17-1776-RSM-BAT

11 v.

12 DONALD R. HOLBROOK

13 Respondent.

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DISMISSING CASE

14 **I. INTRODUCTION**

15 This matter is before the Court on the Report and Recommendation (“R&R”) of the
16 Honorable Brian A. Tsuchida, United States Magistrate Judge. Dkt. #29. The R&R recommends
17 that the Court deny Petitioner Joel Zellmer’s 28 U.S.C. § 2254 petition for habeas relief from his
18 2010 jury-trial conviction. Petitioner has filed Objections to the R&R, Dkt. #30, and Respondent
19 opposes Petitioner’s Objections, Dkt. #31. For the reasons set forth below, the Court adopts the
20 R&R and denies Petitioner’s habeas petition.

21 **II. BACKGROUND**

22 The Court incorporates by reference the background set forth in the R&R. Dkt. #29 at 2-
23 5. In 2003, Mr. Zellmer’s three-year-old stepdaughter A.M., died from drowning while under Mr.

ORDER ADOPTING REPORT AND RECOMMENDATION
AND DISMISSING CASE - 1

1 Zellmer's care. Dkt. #22-5 at 43. In 2005, two years before Mr. Zellmer was charged with murder,
2 police officers executed a search warrant on Mr. Zellmer's home and obtained large volumes of
3 documents. Dkt. #9 at 37. At the time of the search, officers were aware that Mr. Zellmer was
4 involved in other judicial proceedings, including divorce and custody disputes as well as a
5 wrongful death suit brought by A.M.'s mother. *Id.* at 36. To avoid breaching attorney-client
6 confidentiality, the officers scanned and set aside potentially privileged documents without
7 reviewing them.

8 The State allowed Mr. Zellmer's attorney to review the seized items and identify any
9 documents that were either privileged or beyond the scope of the warrant. *Id.* The state trial court
10 then appointed a Special Master to review materials designated as privileged. *Id.* at 37-38.
11 Investigators never reviewed the challenged documents again. Two of the seized documents
12 included a document on Mr. Zellmer's computer titled "accident.doc" that provided an account of
13 how A.M. had drowned, as well as a file from Mr. Zellmer's homeowner insurance carrier
14 regarding the carrier's obligation to represent Mr. Zellmer in a wrongful death case. *Id.* at 37-38.
15 The "accident.doc" file and the insurance file provided accounts of A.M.'s drowning that differed
16 from the account Mr. Zellmer alleged in his criminal case. Both documents were deemed
17 privileged and excluded from trial. *Id.* The state trial court concluded that the State had not gained
18 any benefit from seeing the "accident.doc" document or insurance file, since the State already had
19 other evidence demonstrating Mr. Zellmer's inconsistent versions of events that was ultimately
20 presented at trial. *Id.* at 38-39.

21 In 2010, a jury convicted Mr. Zellmer of second degree murder of A.M. Dkt. #1 at 1. Mr.
22 Zellmer challenged the conviction on direct appeal and in a personal restraint petition ("PRP") in
23 state court, claiming that the trial court mishandled the attorney-client privileged documents. *Id.*

1 at 5. The state court denied Mr. Zellmer relief on direct appeal and in his collateral attack on the
2 conviction. While his PRP was pending, Mr. Zellmer filed a Public Records Act request for
3 production of all documents seized during the search. Dkt. #27 at 8. This request produced records
4 that included photographs of plainly-labeled banker boxes of litigation records taken from Mr.
5 Zellmer's home office that were not produced to defense counsel. *Id.* at 9. In withholding these
6 records, Mr. Zellmer argues, his defense trial counsel was not aware of the depth of the State's
7 intrusion into attorney-client privileged documents. *Id.* at 11 ("Zellmer's trial attorneys were kept
8 in the dark about the full extent of the seizures and dissemination of records prior to the court's
9 appointment of a special master.").

10 The Washington state court of appeals dismissed Mr. Zellmer's PRP and declined to hold
11 an evidentiary hearing related to the public records request documents. The court concluded that
12 his arguments regarding the public record requests were untimely, since he raised them for the first
13 time in his reply. Dkt. #22-5 at 23. Moreover, the court found that documents obtained from the
14 public records requests did not undermine the court's conclusion that there was "no deliberate and
15 egregious intrusion" by the State into Mr. Zellmer's attorney-client privilege. *Id.* Similarly, the
16 Washington state supreme court commissioner denied review of his PRP on the basis that "Mr.
17 Zellmer's assertion that the State obtained and used privileged information by way of . . . the seized
18 documents is too speculative to justify a reference hearing." *Id.* at 47-48.

19 Mr. Zellmer petitions this Court for federal habeas relief on three grounds: (1) violation of
20 his right to counsel through the seized attorney-client privileged documents; (2) violation of his
21 right to counsel through placing him with a jailhouse informant; and (3) improper expert testimony
22 and non-testifying expert opinions. *See* Dkt. #1 at 5-8. In response to the State's briefing, Mr.
23 Zellmer only disputes the State's position on the first ground: whether he was improperly denied

1 a full evidentiary hearing at the state-court level to examine the extent of intrusion into his attorney-
2 client relationship. Dkt. #27 at 1-2. Mr. Zellmer acknowledges that the Special Master resolved
3 any question as to the use of the seized documents at trial. *Id.* at 18. However, he contends that
4 “it is not clear, and could not be clear on the state’s record, whether state investigator[s] or
5 attorneys obtained an impermissible benefit from their acquisition and review prior to the order
6 appointing the special master.” *Id.* For that reason, he requests that this Court order the state court
7 to undertake “an authoritative fact resolution” of the State’s invasion of Mr. Zellmer’s privileged
8 communications and, or alternatively, order a federal court evidentiary hearing under 28 U.S.C. §
9 2254(e). *Id.* at 12.

10 **III. DISCUSSION**

11 **A. Legal Standards**

12 A district court has jurisdiction to review a Magistrate Judge’s report and recommendation
13 on dispositive matters. *See* Fed. R. Civ. P. 72(b). “The district judge must determine de novo any
14 part of the magistrate judge’s disposition that has been properly objected to.” *Id.* “A judge of the
15 court may accept, reject, or modify, in whole or in part, the findings or recommendations made
16 by the magistrate judge.” 28 U.S.C. § 636(b)(1). The Court reviews de novo those portions of
17 the report and recommendation to which specific written objection is made. *United States v.*
18 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

19 Habeas petitions are governed by the Antiterrorism and Effective Death Penalty Act of
20 1996 (“AEDPA”). 28 U.S.C. § 2244, *et seq.* Under AEDPA, a petitioner is entitled to federal
21 habeas relief only if s/he can show that the state court’s adjudication of his or her claim: (1)
22 resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
23 established federal law; or (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2); *Greene v. Fisher*, 565 U.S. 34 (2011).

AEDPA creates a “highly deferential” standard for evaluating state court rulings and “demands that state court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). A state court’s decision is contrary to clearly established federal law if it “applies a rule that contradicts the governing law set forth in [Supreme Court] cases,” or arrives at a different result in a case that “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court.” *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). “The state court’s application of clearly established law must be objectively unreasonable, not just incorrect or erroneous.” *Crittenden v. Ayers*, 624 F.3d 943, 950 (9th Cir. 2010) (internal quotation marks omitted). Furthermore, a federal court must “presume the state court’s factual findings to be correct, a presumption the petitioner has the burden of rebutting by clear and convincing evidence.” *Id.*

This standard is intentionally “difficult to meet,” because habeas is intended to function as a “guard against extreme malfunctions in the state criminal justice systems, not as a means of error correction.” *Greene*, 565 U.S. at 38 (citations omitted). A petitioner must therefore show that the “state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

B. Habeas Relief for Violation of Attorney-Client Privilege

Mr. Zellmer only disputes the State’s position on his first ground for relief regarding the State’s intrusion into the attorney-client privilege from the 2005 seizure of his records. *See* Dkt. #27 at 1-2. With respect to the other two grounds for relief, the Court agrees with the R&R’s

1 conclusion that Mr. Zellmer has failed to demonstrate that the state court’s decision was an
2 unreasonable application of law or unreasonable determination of the facts, or that he suffered
3 actual prejudice as a result. Dkt. #29 at 2 (citing 28 U.S.C. § 2254(d)(1)-(2); *Brecht v.*
4 *Abrahamson*, 507 U.S. 619, 637–39 (1993)).

5 Mr. Zellmer argues that the State’s alleged intrusion into the attorney-client privilege
6 amounts to “an unconstitutional intrusion past the seal of secrecy” in violation of his Sixth
7 Amendment right to counsel. Dkt. #27 at 27. In recommending that the Court deny Mr. Zellmer’s
8 petition, the R&R found his argument “fatally flawed” for several reasons: (1) the Supreme Court
9 has never equated a speculative violation of state law attorney-client privilege with a violation of
10 federal law or the Constitution; (2) even if such a clearly established right existed, he has not
11 demonstrated how the state court misapplied federal law regarding attorney-client privilege; (3)
12 he has failed to show that the state court made an unreasonable determination of the facts in light
13 of the evidence; and (4) he has failed to justify his entitlement to a federal evidentiary hearing.
14 Dkt. #29 at 5. Mr. Zellmer objects to all four reasons. Dkt. #30. The Court will address each
15 objection in turn.

16 1. Supreme Court Precedent

17 Mr. Zellmer objects to the R&R’s determination that he failed to rely on clearly established
18 Supreme Court precedent to show that the State’s actions violated federal law or the Constitution.
19 Dkt. #30 at 3. He contends that he raised the Supreme Court’s decision in *Hunt v. Blackburn*. *Id.*
20 (citing 128 U.S. 464 (1888)). While he acknowledges that *Hunt* is not a criminal case, he claims
21 that it addressed the “necessity” that clients and attorneys have a “seal of secrecy” placed on their
22 communications so as to ensure that the client is “free from the consequences or the apprehension
23 of disclosure.” *Id.* (quoting *Hunt*, 128 U.S. at 470–71). However, the R&R did acknowledge *Hunt*

1 and found the case inapposite. *See* Dkt. #29 at 6. This Court agrees. *Hunt*, a civil property case,
2 discussed attorney-client confidentiality in the context of the evidentiary privilege wherein the
3 client alone holds the privilege but may voluntarily waive it. *Hunt*, 128 U.S. at 470. It is neither
4 factually similar to the facts of this case, nor does it support Mr. Zellmer's proposition that any
5 invocation of state attorney-client privilege equates to a de facto violation of federal law or the
6 Constitution. *See* Dkt. #29 at 6.

7 Mr. Zellmer similarly objects on the basis that he cited *Massiah v. United States*. Dkt. #30
8 at 3 (citing 377 U.S. 201, 205–06 (1964)). Again, the Court finds Mr. Zellmer's reliance
9 misplaced. *Massiah* holds that a defendant's own incriminating statements, obtained by federal
10 agents through indirect and surreptitious interrogations without his counsel present, may not be
11 used by the prosecution as evidence against him at trial. 377 U.S. at 206–07. *Massiah* does not
12 support Mr. Zellmer's proposition here, which is that the State's seizure of his attorney-client
13 privileged documents from prior civil cases as part of a valid search and the State's retention of
14 those documents equates to a violation of his right to counsel.

15 Contrary to Mr. Zellmer's position, the Supreme Court has explicitly rejected a per se rule
16 that government intrusion into attorney-client communications automatically gives rise to a Sixth
17 Amendment violation of a defendant's right to counsel. Rather, there must be some indication that
18 the prosecution actually used the evidence that might otherwise be inadmissible at trial, thereby
19 resulting in prejudice. *Weatherford v. Bursey*, 429 U.S. 545, 552 (1977) (“[W]hen conversations
20 with counsel have been overheard, the constitutionality of the conviction *depends on whether the*
21 *overheard conversations have produced, directly or indirectly, any of the evidence offered at*
22 *trial.*”) (emphasis added); *see also United States v. Danielson*, 325 F.3d 1054, 1069 (9th Cir.
23 2003), *as amended* (May 19, 2003) (“We have construed *Weatherford* to mean that there is no

1 Sixth Amendment violation unless there is prejudice. . . . mere government intrusion into the
2 attorney-client relationship, although not condoned by the court, is not itself violative of the Sixth
3 Amendment right to counsel.”) (quoting *United States v. Irwin*, 612 F.2d 1182, 1186–87 (9th Cir.
4 1980)) (internal quotations omitted). Accordingly, the Court finds that Mr. Zellmer’s claim does
5 not rely on clearly established federal law as determined by the Supreme Court.

6 2. State Court Application of Federal Law

7 Mr. Zellmer also objects that the R&R failed to address the state court’s application of
8 *State v. Cory*, which he argues “stands for the proposition that under state privilege law . . . the
9 State may not knowingly acquire privileged communications between counsel and the defendant.”
10 Dkt. #30 at 2 (citing 62 Wn.2d 271, 374–75 (1963)). The Washington state court of appeals, in
11 contrast, read *Cory* as holding that intrusion into the attorney-client privilege requires reversal only
12 when the intrusion is “deliberate and egregious,” and that the “intrusion is deliberate and egregious
13 when the intercepted communications *are those between the defendant and his counsel in the case*
14 *being tried.*” Dkt. #22-1 at 17 (emphasis added).

15 As an initial matter, in considering whether the state court’s decision was contrary to
16 clearly established federal law, the R&R appropriately limited its analysis to Supreme Court
17 precedent. Dkt. #29 at 6 (“The Supreme Court has restricted ‘clearly established Federal law’
18 under 28 U.S.C. § 2254(d)(1) to ‘the holdings, as opposed to the dicta, of this Court’s decisions as
19 of the time of the relevant state court decision.’”) (quoting *Carey v. Musladin*, 549 U.S. 70, 74
20 (2006) (internal quotations omitted)). For that reason, Washington state cases such as *Cory* cannot
21 support Mr. Zellmer’s claim of constitutional error. *See Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017)
22 (“[A]s we have repeatedly pointed out, ‘circuit precedent does not constitute clearly established
23 Federal law, as determined by the Supreme Court.’ Nor, of course, do state-court decisions,

1 treatises, or law review articles.”) (quoting *Glebe v. Frost*, 135 S. Ct. 429, 420 (2014) (per
2 curiam)).

3 Moreover, even if the precedent set forth in *Cory* supplied federal law, Mr. Zellmer has not
4 shown that the state court’s application of the case was unreasonable. *Cory* established a rebuttable
5 presumption of prejudice where the State engaged in intentional eavesdropping on conversations
6 between a defendant and his legal counsel. *See* Dkt. #30 at 2 (citing *Cory*, 62 Wn.2d at 374–75).
7 Mr. Zellmer argues that the intentional eavesdropping at issue in *Cory* is analogous to the State’s
8 actions here. *Id.* at 3 (“There is no legal distinction between the communications other than *Cory*’s
9 being simultaneous with his *live* discussions with counsel and Zellmer’s being preserved in his
10 *written* correspondence.”) (emphasis in original). The Court finds Mr. Zellmer’s analogy
11 unavailing. Here, the State obtained attorney-client privileged documents from civil cases that
12 preceded Mr. Zellmer’s criminal case through a valid search and seizure process. The documents
13 were then scanned and set aside by officers to avoid breaching confidentiality. As the state court
14 identified, *Cory* expressly differentiated between privileged communications from the case being
15 tried and communications related to other cases. Given these distinctions, the Court does not find
16 the state court’s application of *Cory* unreasonable.

17 3. Reasonableness of State Court’s Factual Determination

18 Mr. Zellmer also objects to the R&R’s conclusion that he failed to show that the state court
19 adjudication was based on an unreasonable determination of the facts in light of the evidence. Dkt.
20 #30 at 5. Referencing the evidence acquired through his Public Records Act lawsuits, Mr. Zellmer
21 argues that state court did not have the “actual body of records” suppressed during discovery, trial
22 and post-trial hearings and thereby failed to consider the “actual extent of the [S]tate’s intrusion
23 before, during, and after trial.” Dkt. #30 at 5-6. He contends that the state court of appeal’s refusal

1 to consider new evidence, on its own, is sufficient to meet the standard under 28 U.S.C. 2254(d)(2)
2 regarding unreasonable determination of the facts. *Id.* at 8.

3 In reviewing the reasonableness of the state court's factual determinations, the Court is
4 limited to "the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *Holland*
5 *v. Jackson*, 542 U.S. 649, 652 (2004). A federal court must "presume the state court's factual
6 findings to be correct, a presumption the petitioner has the burden of rebutting by clear and
7 convincing evidence." *Crittenden*, 624 F.3d at 950. Mr. Zellmer has not presented clear and
8 convincing evidence demonstrating that the state court's factual determination was unreasonable.
9 He does not dispute that the trial court excluded any allegedly privileged material from trial and,
10 in fact, concedes that the Special Master "resolved any question as to the use of such documents
11 in trial." Dkt. #27 at 17. His argument therefore relies on mere speculation as to whether the state
12 investigators or attorneys "obtained an impermissible benefit" from acquisition and review of the
13 seized documents "prior to the order appointing the special master." *Id.* at 18.

14 Both the state court of appeals and state supreme court commissioner identified this flaw
15 in Mr. Zellmer's argument when they rejected his effort to expand the record to include evidence
16 obtained through his public record requests. *See* Dkt. #22-5 at 23, 46. The R&R likewise found
17 "no indication from the record that this was an unreasonable determination of the facts and there
18 is no reason to follow Mr. Zellmer down the rabbit hole of speculating about the value of
19 undisclosed evidence never used during trial." Dkt. #29 at 8. The Court agrees that Mr. Zellmer's
20 conclusory argument relies on speculation as to the value prosecutors might have derived from
21 undisclosed evidence. Accordingly, the Court finds that he has not shown that the state court's
22 decision was based upon an unreasonable determination of the facts in light of the evidence.

1 4. Basis for Evidentiary Hearing

2 Finally, Mr. Zellmer objects to the R&R’s finding that he should not be afforded a state or
3 federal evidentiary hearing on the evidence obtained through the public records requests. Dkt. #30
4 at 6. The federal habeas statute provides that an evidentiary hearing shall not be held on the claim
5 unless the applicant shows that:

6 (A) the claim relies on (i) a new rule of constitutional law, made retroactive to cases
7 on collateral review by the Supreme Court, that was previously unavailable; or (ii)
8 a factual predicate that could not have been previously discovered through the
9 exercise of due diligence; and (B) the facts underlying the claim would be sufficient
to establish by clear and convincing evidence that but for constitutional error, no
reasonable factfinder would have found the applicant guilty of the underlying
offense.

10 28 U.S.C. § 2254(e). Here, Mr. Zellmer objects that because the state court refused to consider
11 new evidence acquired through his Public Records Act lawsuits, it failed to consider the “actual
12 extent of the [S]tate’s intrusion before, during, and after trial.” Dkt. #30 at 6. Relying on *Cullen*
13 *v. Pinholster*, Mr. Zellmer contends that his factual showing meets the standard for a hearing under
14 Section 2254(e)(A)(ii) since he has shown that the State foreclosed consideration of hundreds of
15 additional records withheld until half-way through his PRP. *Id.* at 6-7 (citing 563 U.S. 170, 181
16 (2011)). He argues that because the state court should have been given the “first shot” at reviewing
17 such evidence, this Court should now permit him to further develop the factual basis of his claim
18 either through a state or federal court evidentiary hearing. Dkt. #30 at 8 (citing *Pinholster*, 563
19 U.S. at 185).

20 Here, the state court was indeed given the “first shot” at reviewing the evidence and
21 declined to hold an evidentiary hearing. As described above, the state court of appeals rejected on
22 the merits Mr. Zellmer’s argument that the State unconstitutionally intruded on the attorney-client
23 relationship, finding that the “new evidence” Mr. Zellmer sought to present on reply—in the form

1 of bankers boxes of privileged documents from Mr. Zellmer’s civil cases—was both untimely and
2 would not undermine its conclusion that there had been no deliberate or egregious intrusion by the
3 State in the criminal case. *See* Dkt. #22-5 at 23. Likewise, in denying review of the PRP, the
4 Washington state supreme court commissioner found Mr. Zellmer’s argument that the State had
5 obtained and used privileged information by way of the seized documents was “too speculative”
6 to justify a reference hearing. *Id.* at 46. Accordingly, in rejecting Mr. Zellmer’s claim on the
7 merits, the state court was provided “the first opportunity to review [a] claim, and to correct any
8 constitutional violation in the first instance” as contemplated by AEDPA. *Pinholster*, 563 U.S. at
9 185 (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)) (internal quotations omitted).
10 The state court was not obligated to hold an evidentiary hearing related to the public records
11 request documents, and its decision to not hold a hearing on the matter does not render its factual
12 determinations unreasonable. *See Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004) (Finding
13 that an evidentiary hearing is not a pre-requisite to entitle a state court to AEDPA deference).

14 Furthermore, as set forth above, Mr. Zellmer has offered no cognizable grounds for habeas
15 relief under § 2254(d). An evidentiary hearing at this juncture would therefore be futile. *Sully v.*
16 *Ayers*, 725 F.3d 1057, 1075 (9th Cir. 2013) (“[A]n evidentiary hearing is pointless once the district
17 court has determined that § 2254(d) precludes habeas relief.”). Accordingly, the Court finds that
18 Mr. Zellmer is not entitled to a state or federal evidentiary hearing.

19 **C. Certificate of Appealability**

20 Lastly, Mr. Zellmer objects to the R&R’s recommendation that this Court deny him a
21 certificate of appealability (“COA”), claiming that he “has demonstrated a substantial showing of
22 the denial of his constitutional right to counsel free from intrusion into confidential matters.” Dkt.
23 #30 at 10. A COA may only be issued where a petitioner has made “a substantial showing of the

1 denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). To satisfy this standard, a prisoner must
2 demonstrate “that jurists of reason could disagree with the district court’s resolution of his
3 constitutional claims or that jurists could conclude that the issues presented are adequate to deserve
4 encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

5 Here, the Court finds no basis on which a reasonable jurist would disagree that Mr. Zellmer
6 has failed to demonstrate that the state court violated clearly established federal law or reached an
7 unreasonable determination of the facts in light of the evidence. The Court likewise finds no basis
8 on which a reasonable jurist would disagree that Mr. Zellmer is not entitled to a federal evidentiary
9 hearing on a meritless claim. For these reasons, the Court agrees with the R&R’s recommendation
10 to deny issuance of a COA.

11 CONCLUSION

12 The Court, having reviewed Plaintiff’s complaint, the Report and Recommendation of the
13 Honorable Judge Brian A. Tsuchida, United States Magistrate Judge, any objections thereto, and
14 the remaining record, hereby finds and **ORDERS** as follows:

- 15 (1) The Report and Recommendation is approved and adopted;
- 16 (2) Petitioner’s 28 U.S.C. § 2254 habeas petition is **DENIED**, and this case is
17 **DISMISSED with prejudice**;
- 18 (3) Petitioner is **DENIED** issuance of a certificate of appealability; and
- 19 (4) The Clerk shall send a copy of this Order to the parties and to Judge Tsuchida.

20 DATED this 17 day of December 2019.

21 

22 RICARDO S. MARTINEZ
23 CHIEF UNITED STATES DISTRICT JUDGE